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Paper: Comparative Constitutional Law

Module: Constitutionalism in the Global South
Module Overview: This module focuses on constitutions and constitutionalism in the Global South. Much of the traditional comparative constitutional law ignores the perspective of the Global South. This module will provide an overview of constitutions of the Global South and explore their values and functions.

Subject Name: Law

Paper Name: Comparative Constitutional Law

Module ID: 4

Pre-requisites: Knowledge of constitutional law, comparative law.

Objectives:
- Explore constitutions and constitutionalism in the Global South
- Understand the experiences of transformative and post-colonial constitutions
- Understand the status of socio-economic rights in transformative/post-colonial constitutions

Keywords: comparative constitutional law, comparative law, global south, transformative constitutions, post-colonial constitutions

Learning outcomes:
Students are introduced to the idea that constitutions perform distinct functions in the developing world, or the Global South. These constitutions may place special emphasis on socio-economic rights and seek to be transformative. This module emphasizes the importance of studying jurisdictions in the Global South.

CONSTITUTIONALISM IN THE GLOBAL SOUTH

INTRODUCTION

The 20th century has justifiably been called an ‘age of Constitutionalism’. More and more countries now have written constitutions of their own (the total number is over 140). Many of these constitutions came up in ‘waves’—in the 1940s, in the 1960s and 1970s as decolonization occurred in Asia and Africa, and in the 1990s as countries moved away from totalitarian, communist regimes. As

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2 Id.
3 There is also a broader question of whether the Arab spring that started in 2010 will mark a new constitutional wave as such. See Biagi, Francesca, *Will Surviving Constitutionalism in Morocco and Jordan Work in the Long Run: A Comparison with Three Past Authoritarian Regimes*, Paper presented at the World Congress on Constitutional Law, 2014. Available online at
the number of constitutions and spread of constitutions has increased, the idea of comparative constitutional law has seen many contestations and questions. Comparative constitutional scholarship has generally not kept abreast with these developments. For instance, most comparative law scholarship, until very recently, focused only on a few jurisdictions, largely from what used to be called the ‘developed world’. Indeed, some scholars have criticized the fact that Western societies have formed the bulk of most comparisons, and that other constitutions have not been adequately examined in coming up with conclusions about ‘global’ constitutional law. During the course of this module, we will examine examples of the kind of social structures and political organisations that these constitutions deal with, and the solutions they have attempted to create.

In particular, we will see the idea of ‘transformative’ constitutionalism and look at examples from India, South Africa, and African countries. We will also look at the idea of socio-economic rights, and how these countries have used constitutions as means of ensuring a more equitable society.

UK, Israel, US, Germany, Canada, South Africa, India form the bulk of all global constitutional discourse. Apart from India and South Africa, these countries are in the global ‘North’.

1.1: But What Are The Problems With Such models: What does the Global South Even Mean?

When one talks about the South, one is referring to what were earlier called the “third world” or “developing countries”. These include the vast majority of the world—countries as different as India, Ethiopia, Benin, Fiji, and Mexico come within the ambit of the Global South.

Despite significant differences between these countries, however, there are commonalities that justify treating them as a unified category. Many of these countries are economically poor, have been colonized at some point in their history, are grappling with industrialization and a great deal of inequality. Often, this inequality is more than economic—it is racial, cultural, or linguistic. As countries that have been colonized in the past, their legal histories are often informed by this colonial past. India’s legal system, for instance, is strongly influenced by Britain; similarly, France has impacted Mali and Algeria’s legal


5 Supra n. 4, Hirschl.


7 South Africa, for example, has grappled with issues of economic
systems, and so on. This has led some people to make assumptions about not requiring to examine the Constitutions of these countries in detail—scholars typically justified this neglect by considering constitutions in these areas to either be ‘impositions’ or ‘copies’ of their colonial masters. As most “highly valued” scholarship ends up (problematically) being produced in the North, this also means that access to information about these constitutions is rare. This produces a cycle of lack of information through which these constitutions were, until recently, relegated to the periphery of comparative constitutional law.

Given that the word ‘constitution’ itself means something that creates or constitutes a new polity, it is obvious that nations derive value and identity through the creation of a constitution. The Indian constitution’s use of “We, the people of India” or the Bangladeshi constitution’s invocation of its independence struggle in its preamble imply their deep regard for the constitution being a mirror to their national aspirations. As a result of this, the lessons one may derive from these constitutions is very different from that which one derives from ‘Northern’ constitutions.

Engaging with these constitutions is intensely useful. First, many of these constitutional engage with new questions. Traditionally, constitutions have been perceived as ways to ‘preserve’ rights and social order. Constitutions from the South have struggled with questions dealing with poverty, colonialism, national institutions in deeply fractured societies, and powers of the judiciary. When we examine these constitutions, we often see new ways through which these issues can be dealt with. Secondly, these constitutions also deal with socio-economic rights as justiciable or semi-justiciable narratives, in contrast to the narrative in developed western nations which have often challenged the very existence of these rights. Thirdly, in many ways, these Constitutions engage with issues of religion and culture in creative ways, which may give us more help in understanding how multicultural societies can examine these situations.

Note: 1. The Global south is a new term for what were earlier called developing countries, or the ‘third world’. These countries struggle with poverty, inequality, and the legacy of colonialism.

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9 For an analysis of this, see Jacobsohn, Gary, CONSTITUTIONAL IDENTITY, Harvard University Press, 2010. Here, Jacobsohn compares different constitutions and examines their idea of how the identity of a constitution is created.
10 Isacharoff, Samuel, Constitutionalising Democracy in Fractured Societies, 82 Tex. L. Rev 1861, which deals with South Africa and Bosnia.
11 Most notably through the idea of ‘activist courts’, wherein constitutions guarantee far wider roles to the judiciary than the traditional “resolver of disputes” function that these courts have followed. The Indian Supreme Court is an example, but other countries in the South also often have deeply powerful courts. See, for instance, Young, Katharine, A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review, 8 Int’l J. Con L. 385 (2011) and Ginsburg, Tom and Dixon, Rosalind, The South African Constitutional Court and Socio-Economic Rights as Insurance Swaps, (Working Paper, University of Chicago), 2013, which looks at the creative ways in which such Courts work.
2. Preservative constitutions are understood as constitutions that seek to preserve the social order in states. These constitutions typically limit interference, and attempt to preserve long-standing practice; as opposed to transformative constitutions, which challenge established practices in order to come up with newer solutions to issues.

I The Idea of Constitutions as Transformative Texts:

*R v. Makwanyane (South Africa)¹²*: “There is a stark and dramatic difference between the past in which South Africa was trapped and the future in which it now emerges”.

Karl Klare, a notable scholar of South African constitutional law, defines transformative constitution as “a long term process of constitutional enactment, interpretation and enforcement committed to transforming the social and political institutions in a democratic, participatory, and egalitarian direction, (therefore) facilitating change in non-violent ways”.¹³Courts, when interpreting such constitutions, use them as sites for social change. Through assisting (and sometimes opposing) the legislature, courts can play a significant role in ensuring protection of some kinds of rights. Interpreting the constitution is not seen as a value-neutral exercise, but rather as one that promotes certain visions of the state. Usually such constitutions, through a decisive break with the past, ground this interpretation in human dignity and human rights-centric norms.¹⁴

Often, the argument that rights are guaranteed by tradition, so common in Europe and North America, loses its validity when we talk of the global south. Countries like the USA and UK have historical linkages to the past and to rights-based understandings (for example, the idea of limited government is commonly understood to originate with the UK’s Magna Carta (1215), or US’s Bill of Rights (1781). However, the global south often does not have this kind of history. On the contrary, many such countries have had deeply exclusionary and complicated histories, usually due to colonization and similar processes. Hence, the chance to draft ‘indigenous’ constitutions then becomes a way by which constitutions assert their own identity. For instance, in Latin America, we see the recognition of the rights of indigenous people being a significant question: this grappling with issues of tribal rights is the first time the formal legal in these countries has tried to incorporate indigenous cultures.

As we will see, there is no ‘one’ definitive model of transformative constitutions. Some constitutions may be transformative from when they were created, others may, however, become transformative over a period of time; yet others may require judicial intervention to reach this point.

Note 4: A transformative constitution is a constitution which attempts to re-engineer society through its provisions. Therefore, they want to rework society, and make a new social order. This is different from a preservative constitution, which uses the constitution to maintain the status quo.

Note 4: Apartheid in South Africa, the caste system in South Asia (India, Pakistan, Bangladesh, Nepal), racism in colonized Africa (Democratic Republic of Congo), and the pervasive sexism in most South (and many North) societies are some of the issues transformative constitution aims to combat.

2.1 SOUTH AFRICA: THE ‘DEFINITIVE’ TRANSFORMATIVE CONSTITUTION:

South Africa’s constitution was the first one regarded as ‘transformative’, and with good reason. The apartheid regime had left a deeply divided society—economically, racially, culturally, and educationally. The white minority had a grossly disproportionate share of the national income and extremely skewed access to resources. As apartheid ended, South Africa witnessed violent changes to its constitutional structure. A new constitution was promulgated through widespread consultative processes, with an Interim Constitution in the meanwhile. To reconstitute the country, a Constitutional court was established to look at provisions of the new Constitution in light of the constitutional values that the interim Constitution of South Africa had set out.

R v. Makwanyane was one of the first cases the Court dealt with. Dealing with the constitutionality of the death penalty, it gives us an example of the transformative leap provided for in the constitution. Justice Chaskallson claimed that the South African constitution “provided for a historic bridge between the past of a deeply divided society...and a future founded on human rights, democracy, and peaceful co-existence”. Through provisions which ensured broad non-discrimination clauses (including a reference to ‘sexual orientation), arguing for socio-economic rights as ‘rights’ (which will be dealt with later), and the recognition of traditional cultural rights and concepts, it attempted to break with a “disgracefully racist, insular and authoritarian past”.

Transformative constitutions are often supposed to symbolize a break with the past, however, this break can equally be understood in terms of a break with a colonial past, and a return to precolonial values. As a Constitution that has made serious efforts to value diversity and indigenous tradition— in sharp contrast to the century of colonial rule that preceded it— traditional African

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15 Id, Murray, 819-23.
values have been incorporated within the constitution".\(^{18}\) Ubuntu, emphasising on community values and society’s role in defining people, is a notable value. As Mokgoro, J. explains, Ubuntu implies that a person can only be a person through others- thereby including within its ambit human dignity, compassion, communitarianism and co-operation.\(^{19}\) Thus, Ubuntu provides for individuals rights while situating her in the wider community of which the individual is a part, and to which she contributes in significant ways. This marks a significant break with earlier constitutions.

2.2 INDIA’S CONSTITUTION: TRANSFORMATIVE OVER TIME:

India’s constitution gives us an example of a different situation—where a constitution that was arguably transformative when created becomes more transformative through long-drawn out experience. Though conceived of as a democratic exercise and with various novel provisions\(^{20}\), many criticize India’s constitution and constitutional jurisprudence for not marking out a fundamental break with the past in any significant way.\(^{21}\)

Baxi argues, however, that the Indian constitution became transformative over the course of various judicial decisions, notably in the 1960s and 1970s.\(^{22}\) As the constitution started to read the right to life to include positive obligations upon the state\(^{23}\), the expressly unjusticiable Directive Principles of State Policy as part of an expanded Article 21, (of which more will be dealt with through the later part of this chapter) and the idea of increased access to judicial review, the constitution increasingly fulfilled the essential premise of transformative constitutions—ie—aiding in the social transformation of a society. The Indian supreme Court is now considered to be one of the most powerful Supreme Court’s in the world. Through a system of ‘Public Interest Litigation’ which allows for these rights to be invoked even through letters (epistolary jurisdiction), the Court has attempted to ensure a right to food, better environmental protection, and workers’ rights.

Baxi’s hypothesis is somewhat supported by Bhagwati, J., who explained how the idea of Public Interest Litigation came about in a later interview.

\(^{18}\) SOUTH AFRICAN CONST., § 1 (a).
\(^{20}\) Many have actually argued that the constitution is a transformative exercise. The existence of the fundamental rights, DPSP and many other provisions may suggest that it is one. However, I would argue that this is not true here, simply because the way in which the constitution was read continued to draw a link with the past.
\(^{21}\) Kannabiran, K.G., THE WAGES OF IMPUNITY, Orient Blackswan, 2010, 30-33 brings out this clearly when talking about how the first decision of the Indian Supreme Court involved holding a preconstitutional law authorizing preventing detention legal.
\(^{23}\) Maneka Gandhi v. Union of India, AIR 1978 SC 597.
“I saw stark poverty, and the utter helplessness of people—justice was far, far removed from them... I realized I needed to address the lack of awareness, assertiveness and availability of machinery”.  

2.3 OTHER SOUTHERN CONSTITUTIONS: VARYING DEGREES OF TRANSFORMATIVE POTENTIAL:

Sometimes, constitutions may attempt to be transformative, but may not be able to carry out their intended task. The Ethiopian constitution is a useful way to understand ‘imperfectly transformative’ constitutions—ie—constitutions which seek to be transformative, but are hampered by political and legal issues. The Ethiopian constitution provides for ‘the ideals... and the commitment of the peoples of Ethiopia to live together’ and for the respect of “inviolable and inalienable human rights” of all persons. A set of economic, political, social and cultural objectives provide for transformative potential of the constitution.

Despite such provisions, however, the ground realities are somewhat disappointing. Ethiopia’s human rights record has been characterized by serious violations, draconian laws have been passed by an executive with untrammeled powers, and political pluralism is waning. This is a good example of how constitutions that envisage themselves as being transformative are often prevented from their aims through corrupt judiciaries and powerful executives.

Looking at Latin America also gives us examples of transformative constitutions. Many countries in this area have had a difficult history with multiple constitutions. Indeed, the Dominican Republic has had 32 constitutions in its two-century long history, most the product of short-lived revolutions. Since the 1980s, however, Latin America has seen a set of (broadly similar) constitutional processes, which some commentators call the ‘first wave of democratic constitutionalism’ since their independence in the 1820s. There are various commonalities to this process—most of them have explicit recognition for tribal and indigenous peoples’ rights, strong socio-economic rights, and equalizing principles in their constitutions.

24 Mate, Manoj, Public Interest Litigation and the Transformation of the Supreme Court of India, in Kapiszewski, Diana et al. (ed), CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVES 261, 281.
25 Article 4, ETHIOPIAN CONSTITUTION. This provision deals with the kind of national anthem that the country shall choose, but the idea of it representing a fundamental break with the past is obvious.
26 Id. Article 10.
27 Id, article 87-91.
Colombia, Brazil, and Ecuador can be good examples of such constitutions. Brazil’s constitution emerged after decades of extremism, social injustice, and inequality. In response to this, it states that Brazil’s polity must be based on solidarity, the eradication of poverty and sub-standard living conditions, and human rights.\textsuperscript{31} The Colombian constitution, promulgated in 1991, provides for novel approaches to socio-economic rights and the rights of indigenous people. Indigenous people are given the right, under Article 246 of Colombia’s constitution, to have separate legal structures for indigenous people, provided they are not contrary to the law and constitution of Colombia.\textsuperscript{32} Indeed, Ecuador’s constitution has gone a step further, and recognized a right to “collective territory, autonomy, and indigenous justice systems” for indigenous people,\textsuperscript{33} in addition to recognizing a right to nature.

Note 6: The new Colombian Constitution provides that the indigenous peoples’ authorities may exercise jurisdictional functions within their territory and in accordance with their own laws and procedures, provided they are not contrary to the Constitution and the laws (Article 246).

3. SOCIO-ECONOMIC RIGHTS AND THEIR JUSTICIABILITY:

Note 7 Socio-economic rights are rights that allow persons to access “minimally decent conditions of life”.\textsuperscript{34} Typically, such rights relate to work, family life, social security, housing, health, clean food and water, and education.

3.1 Historical Understanding of Socio-Economic Rights

To make a distinction between ‘first-generation’ civil and political rights on the one hand, and ‘second generation’ economic and social rights on the other is a futile exercise—the two have often been considered to be indivisible and part of a larger human rights paradigm.\textsuperscript{35} It has been argued that civil and political rights are ‘negative’ rights—in the sense that they require the state to “keep off” people’s enjoyment of these rights, as opposed to socio-economic rights, which place ‘positive obligations’ upon the state. This distinction has now been debunked—both are considered equally important for human survival, and both impose positive and negative obligations upon the state to be effective.\textsuperscript{36}

\textsuperscript{31} Vieria, Oscar V, Descriptive Overview of the Brazilian Constitution and Supreme Court, in TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA, Pretoria University Law Press (2009), 78.
\textsuperscript{32} This is substantially the same as Article 191 (4) of Ecuador’s constitution.
\textsuperscript{33} Andolina, Robert et al, INDIGENOUS DEVELOPMENT IN THE ANDES: CULTURE, POWER, AND TRANSNATIONALISM; quoted in Uprimny, supra n. 30.
\textsuperscript{34} Sunstein, Cass, Social and Economic Rights: Lessons from South Africa, available online at
\textsuperscript{35} To get an understanding of how interrelated these rights actually are, see Alston, Phillip (et al), INTERNATIONAL HUMAN RIGHTS, OUP 2012, 283-85. Here, Alston and Goodman discuss how the ICCPR and the ICESCR, which guarantee these rights under international law, are actually so intertwined that the enjoyment of one set is inextricably linked with the other.
\textsuperscript{36} See Bilchitz, David, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS, OUP 2007, 57-64.
The bulk of ‘first-world’ constitutions, however, did not recognize socio-economic rights as part of constitutional entitlements to rights, though they did recognize need for equality and social security. The American constitution, for instance, promulgated in the late 18th century, recognized a ‘bill of rights’ but only articulated civil and political rights. It was thought (and continues to be thought by some philosophers) that socio-economic aspirations were “meant to be dealt with through the political process”, through “negotiation and compromise”. Given that there could be no clarity on what the scope and extent of such rights would be (would these be based at a minimum subsistence level, or higher depending on the material progress of a society), it has been argued that these are too vague and imprecise to be considered ‘rights’.38

Note 8: Louis Henkin embodies this position in the context of the American constitution: “For Jefferson, the poor had no right to be free from want. The framers saw the purpose of government as being to police and safeguard, not to feed, clothe, and house”39

Given that much of the global south struggles against poverty, illiteracy, hunger, and imperfect labour protection, these arguments seemed unconvincing in the Global South. Arguments such as AmartyaSen’s ‘capabilities approach’, which stresses on the idea of a decent life, health, shelter and food as basic rights without which no other right can exist were the ways through which many of these constitutions examined human rights.40 Broadly, three methods have been used to show how these rights are recognised by constitutions in the global south. These include (1): through the idea of ‘non-justiciable…but fundamental” directive principles of state policy (as India did—though as we will later explain, the judiciary played a very important role in doing so), (2) through including these rights in the constitutional ‘bills of rights’, as South Africa and Brazil did, and (3) through considering international law human rights principles to be incorporated within domestic law, as Mexico did. In the next portion of this chapter, we will examine these three strategies and the ways in which they deepened the world’s engagement with socio-economic rights.

3.2 ‘Directive Principles and activist courts’: The typical Indian experience:

Some countries consider provisions guaranteeing socio-economic rights to be important, but exclude them from the realm of justiciable rights. The Indian constitution, promulgated immediately after World War II, provided for a set of ‘Directive Principles of State Policy’.41 These occupied a strange place in the Indian constitution, as they were considered ‘fundamental’ to governance, but were very

38 For instance, see Kelley, David, A Life of One’s Own: Individual Rights and the Welfare State, in Alston, et al. 300-01.
41 Part IV, CONSTITUTION OF INDIA, 1950.
diverse. They included the right to work\textsuperscript{42}, a duty upon the state to ensure adequate nutrition\textsuperscript{43}, and health, but also included provisions for prohibition and the prevention of cow-slaughter.\textsuperscript{44} As a result, initial interpreters of the constitution were not clear what to make of these provisions—the term “dustbin of sentiment” was once used by a commentator.\textsuperscript{45} However, these seemed useful enough for many African countries to incorporate them—the Ghananian constitution (1992) and the Nigerian Constitution (1979) also provide for similar ‘directive principles of state policy’ which are non-justiciable but nevertheless important.\textsuperscript{46} Inter alia, these rights include access to the “basic necessities of life”,\textsuperscript{47} shelter, reasonable national minimum living wages, and welfare of the sick and disabled.\textsuperscript{48} Indeed, a vast majority of other African countries have enacted such legal frameworks. However, as the traditional understanding of Directive Principles in the Indian context was, these rights were non-justiciable and could only have legal effect through legal enactments.

After the 1960s, however, the ‘right to life’ in the Indian Constitution, which was almost a textbook example of a conservatively drafted ‘negative’ right, started to be interpreted as “a right to live with dignity”. In doing so, the directive principles then became means for ensuring a right to health, a right to food\textsuperscript{49} (through an innovative set of orders by which the Supreme Court continues to supervise the enforcement of this right), and a right to livelihood and shelter\textsuperscript{50} being read in as part of Article 21. This has still not happened, despite many arguing for a similar judicially created transition, in the other countries we have so far mentioned.

In India’s case, the Supreme Court has evolved many mechanisms of making these rights more relevant to people. We have already mentioned the relaxation of the \textit{locus standi} rule through enhanced PIL litigation. In a notable case, however, the Indian Supreme Court has refrained from passing a final judgment \textit{because} it feels that a constant supervision would result in better enforcement. The \textit{PUCL v. Union of India} petition, which has read the right to food as part of the right to life, is an example. Here, the Supreme Court has (and continues to) pass various interim

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\textsuperscript{42} Article 41, id.

\textsuperscript{43} Article 47, id.

\textsuperscript{44} Article 48. Id.

\textsuperscript{45} This was said by a member of the Constituent Assembly, who spoke of the dangers of allowing any member to allow for the riding of his ‘hobby horse’ into these provisions. See Baxi, Upendra, \textit{The Little Done, The Vast Undone: Some Reflections on Reading Granville Austin’s ‘The Indian Constitution}, (1967) 9 JILI 323, 345-47.

\textsuperscript{46} Article 34(1) of Ghana’s constitution requires that the DPSP “guide citizens, parliament, the President, the Judiciary, the Council of State…in taking and implementing any policy decision for the creation of a just and free state”. Similarly, Article 13 of Nigeria’s Constitution makes the realisation of such rights the “duty and responsibility of all organs of government”. See Quashigah, Kofi, \textit{Trends in the Promotion and Protection of Human Rights under the 1992 Constitution}, in Boafo-Arthur, Kwame (ed), \textsc{ONE DECADE OF THE LIBERAL STATE}, Zed Books, 30.


\textsuperscript{48} CONSTITUTION OF NIGERIA, Article 13-24, id.

\textsuperscript{49} \textit{PUCL v. Union of India}.

orders on different aspects of the right to life in order to secure a ‘right to food’ for the population, with its positive and negative dimensions.  

Therefore, the two major problems in the context of Directive Principles are the determination of what precisely is the scope of such obligations, and, once this is determined, to see how these may be used to create and enforce obligations against the state. The alternative, to place these rights within the constitution as justiciable rights, have certain advantages, which we shall now examine.

3.3. Directly Constitutionalising These Rights: The South African and Kenyan Experience:

As already mentioned, the South African constitution was an example of a ‘transformative’ constitution, which signified a break in the past. Such a break also implied importance being given to socio-economic rights, and innovative methods being used to realize them. While some South African commentators made strong cases for following the DPSP model, the constitution ultimately did not effect a distinction, articulating these as rights in the same way as civil political rights. It was argued that to do so would look at human rights in a broad manner and ensure that all needs necessary for human development would be met.

Let us examine the way in which such a right is articulated. Section 26 of South Africa’s constitution provides for the right to housing in the following manner:

26 1) Everyone has the right to have access to adequate housing.

2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

We see that, in this section, the right to housing is treated as paramount. Once something is articulated as a right, it gets a certain moral fillip, which also imposes a positive obligation (as mentioned in Section 26(2)) and strengthens the negative obligation to protect and prevent the deprivation of housing (as stated by Section 26(3)).

51 The Supreme Court’s orders on the Right to Food: A tool for action available online at www.righttofoodindia.org/data/scordersprimer.doc.


54 Liebenberg, Sandra, SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION, Juta 2009, 36. (“Hereinafter, Liebenbeg, SOCIO-ECONOMIC RIGHTS)
Similarly, the right to food and social security starts by affirming that everyone has a right to food\textsuperscript{55}, and then moves on to stating that the state must take ‘reasonable legislative and other measures’ in order to ensure the progressive realization of these rights\textsuperscript{56}, while stating that all persons will have a right to emergency healthcare.

Kenya’s constitution, promulgated in 2010, has also been influenced by South Africa. Article 43 of the Constitution guarantees economic and social rights, including the right to heath, accessible and adequate housing, to be free from hunger, social security and education.\textsuperscript{57} Before this, the Constitution actually says that the state can only argue it does not have adequate resources if it gives priority, in allocating resources, to ensure the widest possible enjoyment of the right, in good faith.\textsuperscript{58}

Once these rights are constitutionalised, however, the question of ‘how much is enough’ also arises. In the case of housing and health rights, what the court is required to examine what the ‘progressive realisation’ requires—whether a “minimum-core” obligation is sufficient, or whether a ‘reasonableness’ requirement is what is required. Both these approaches recognize that socio-economic rights could be fulfilled at various levels—a right to housing could merely mean a right to shelter, or a right to comfortable housing in keeping with the needs of a family. A minimum-core approach implies that a ‘basic’ level of entitlement would take precedence over other ways in which the right could be fulfilled—and that is what would be legally enforceable.\textsuperscript{59}

The alternative, a reasonableness model, however, feels that this kind of approach might actually hinder a fuller enforcement of socio-economic rights. Those who argue this state that the minimum-core approach lacks enough content, and that a broader conception of a right to life is hampered through making only a ‘core’ justiciable.\textsuperscript{60} Therefore, a ‘reasonableness’ approach has often been argued for.

3.2.1: Two Cases: Examples of rejection of the Minimum Core Approach:

The models that we have mentioned above often give rise to conflicting demands. Through a brief discussion of three South African cases, we will see the kind of problems that emerge.

In \textit{Soobramoneyv. Minister of Health}\textsuperscript{61}, the South African constitutional court had to examine whether a 41 year old diabetic man could have access to free dialysis despite not being in a position to pay for it. Here, the Court examined the right to

\textsuperscript{55} Section 27, CONST. S.A
\textsuperscript{56} Section 27(2), id.
\textsuperscript{57} Article 43, Constitution of Kenya, 2010.
\textsuperscript{58} Id, Article 20.
\textsuperscript{60} Liebenberg, 167-69
\textsuperscript{61} 1998 (1) SA 765.
health under the constitution to say that the ‘available resources’ of a state would be relevant in determining whether patients could have access to expensive dialysis procedures. Holding that the state did not have adequate funds, and that there was a scarcity of dialysis machines, the Court expressed sympathy but stopped short of reading the right to life and health as imposing an obligation upon the state for perpetual free dialysis.

A subsequent case, *Grootboom*,62 arose pertaining to the right to housing. A set of people living in overcrowded and waterlogged shacks, who had applied for housing for years, put up shacks on vacant, public land, from where they were evicted and their housing bulldozed. The Court examined the ‘reasonableness’ argument again, and held that the right to housing involved multiple facets, including a “negative obligation placed upon the state to desist from impairing the right to adequate housing.”63 Examining the government’s policy, it held: (a) that the South African national housing programme had failed to facilitate access to temporary relief for people living in intolerable conditions,64 (b) that the housing programme was not adequately budgeted,65 and (c) that the eviction, in the manner in which it was carried out, was inconsistent with the spirit of the Constitution.66 All of this, it held, fell within the ambit of ‘reasonable measures’.

In a later case dealing with the right to water67, Justice Kate O Regan further explained what the ‘reasonableness’ approach was. She argued that litigation for socio-economic rights effectively aimed at the creation of a ‘participative democracy’, where the government was held to account through litigation, and the courts played a somewhat supervisory role. This kind of holding to account would be difficult were only a minimum-core approach to be taken.

Thus, we see that the South African court has consistently rejected the logic of ‘minimum-core’ obligations. Instead, reasonability has been used as a basis for ensuring that persons are assured the substance of the rights. This has not always been successful—indeed, Irene Grootboom died years after the decision, penniless and without a house, but Justice O Regan’s approach suggests ways through which the Court can supervise socio-economic rights adjudication while not encroaching on the legislative sphere.

### 3.3: The Brazilian Examples: Complexity and Concerns:

As mentioned before, Latin American constitutions have also had transformative aims, and have therefore looked for ways to constitutionalise socio-economic rights. In this portion, we will examine (a) some salient features of Latin American constitutions with regard to socio-economic rights and (b) examining Brazil’s

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62 *Government of the RSA v. Grootboom* 2001(1) SA 46 (CC)
63 Id, para. 34.
64 Id, para 52.
65 Id, para 68.
66 Id, para, 88.
history with right to health as a fascinating example of the pitfalls of some aspects of socio-economic rights jurisprudence.

Many of the South American constitutions open with highlighting the importance of human dignity and emphasizing on the need to create a just society. Furthermore, these constitutions have also created judicial mechanisms that are used to operationalise these rights. The idea of *tutela* jurisdiction is somewhat similar to writ jurisdiction in India; a *tutela* is a complaint “any citizen can bring before any judge against a public authority accused of violating his or her fundamental rights.” Similarly, writs like *Amparo*, initially conceived of in Mexico but extended to a variety of Latin American jurisdictions, allow for “simple and prompt recourse” for any actions that violate the fundamental rights of persons. As socio-economic rights have increasingly been guaranteed by these Constitutions, these writs have been enforceable for socio-economic rights.

Brazil’s constitution has also taken socio-economic rights seriously. In contrast to India and South Africa, Brazil is a civil-law country, and has a constitutional culture influenced by continental Europe as well as North America. As such, it does not have a formalized *stare decisis* mechanism, although courts have, in practice, uniformly interpreted the right to health. Though linguistically distinct from the rest of South America, it is similar to other Latin American countries in terms of how it has looked at socio-economic rights. The right to education and health are notable. The right to health finds place in the Brazilian constitution (indirectly) as part of the right to life and through the right to health which is provided in the Constitution as part of a justiciable set of socio-economic rights. Furthermore, a chapter on Social Order, contained in the Brazilian Constitution itself provides that “health...a right for all...is a duty for the state” and shall be guaranteed through policies “aimed at reducing the risk of illness and other hazards”.

As the number of right to health cases have increased, Brazil’s highest court has dealt with many aspects of the right to health. In particular, Brazil has been commended for its fight against HIV-AIDS, largely due to judicial pronouncements. This has not only meant the provision of inexpensive drugs and public health care systems, but now includes the provision of expensive cancer medicine to patients.

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68 Such as the Brazilian, Venezuelan, Colombian and Paraguayan constitutions. All of these mention human dignity as a fundamental value of the state in Article 1 (or in Venezuela’s case, Article 2 of the Constitution). See supra n. 30, Uprimny, 1592-3.
69 Article 3 of Brazil and Venezuela’s constitution; id
70 id.
71 See Article 103 and 106, CONSTITUTION OF MEXICO; Hoyos, Gloria O, *The Amparo Context in Latin American Jurisdictions: An Approach to an Empowering Section*, Available online at http://www.nyulawglobal.org/globalex/Amparo.html#_edn1
73 Article 5, CONSTITUTION OF BRAZIL.
74 Article 6, id.
75 Article 196, id.
76 See, for example, supra n. 72, 124.
prosthetic limbs, and even, in the Cordeiro case, expensive cell transplantation therapy.\textsuperscript{77}

This constitutionalisation has not been without its problems. Critics have argued that treating the right to health as an absolute right puts great pressure on the state’s fiscal resources, and even worse, does not privilege the rights of the most disadvantaged.\textsuperscript{78} For the state to spend so much on high-cost medicines, it is argued, is unjustified when so many other persons can benefit through cheaper mechanisms.\textsuperscript{79}

Hence, we see that the constitutionalisation of socio-economic rights can have various consequences. It is a useful means of ensuring development and can provide relief. In some cases, however, grappling with ‘how much’ and ‘who’ the beneficiaries of these rights are becomes particularly problematic.

4. POST-COLONIAL CONSTITUTIONS AND THEIR TRAJECTORIES: HOW TO MOVE AWAY FROM THE PAST:

Recall that we have spoken about how most of the global South had to deal with colonial pasts which had a significant impact on their legal structures. Ubuntu, which we referred to earlier, was incorporated in South African constitutional jurisprudence to signify a break from colonial systems which did not recognize indigenous modes of law. Colonialism impacted the global south in many ways: through impoverishing and skewing distribution of resources, through creating legal categories that destroyed indigenous social orders, and through political processes that created violent ethnic conflicts.\textsuperscript{80} Therefore, an important way through which transformation happened was through moving away from such edifices.

Often, independence itself did not mean a break with the past. Colonial regimes often ‘imposed’ constitutions on their colonies once they reached independence, which attempted to govern using the same setup (See, for instance, ‘Lancaster House Constitutions’).\textsuperscript{81} In some cases, therefore, the break from colonial structures came years after independence. Through the examples of a few countries, we will examine how the global south has dealt with the legacy of colonialism, and what steps they have taken to combat it.


\textsuperscript{78} Id, 1661.

\textsuperscript{79} Id, 1662.

\textsuperscript{80} The Hutu-Tutsi conflict in Rwanda, for example, which claimed a million lives, was a product of Belgian imperialism. See Dore, Isaak, Constitutionalism and the Post-Colonial State in Africa: A Rawlsian Approach, 41 St. Louis U. L. J. 1301, 1303.

\textsuperscript{81} In Nigeria, Kenya, and Rhodesia (later Zimbabwe), the United Kingdom was involved in drafting the constitution through the Foreign and Commonwealth Office (located at Lancaster House in London). These constitutions therefore did not represent a break with the past.
Note 9: The initial constitutions of countries like Nigeria (1960), South Africa (1909), The Philippines (1946), Egypt (1952), and Rhodesia (1979) were all drafted by colonial masters.

4.2. Malawi: Noble Dreams, but Significant Constraints:

By way of an introduction, it may be mentioned here that Malawi is one of the world’s smallest, and according to the World Bank, one of its poorest member states. Of its ten and a half million, about half are projected to live in poverty. The nation has a long history of suffering and violence, which extends from the era of the British Empire (which dominion only ended in 1964) to the long violent totalitarian rule by Dr. Hastings Banda, where a meaningful human rights regime had virtually ceased to exist.

In 1994, Malawi gave itself a new constitution, which has been widely hailed as one of the world’s most liberal. The range and ingenuity of measures is impressive. They consist of implementation of international law, human rights commissions, overseers to common sites of rights violators (such as prisons) as well as National Commissions to provide redress and compensation for the injustices and atrocities of the past regime. Articles 25, 30 and 44 of the Constitution enshrine the rights to development, livelihood and fair labour practice. Even broader are the directive principles that the State must give heed to in formulating policy.

All in all, this sounds like a template for significant jurisprudential endeavor. However, as 'ideal' as the Malawi constitution is, its instantiation has been plagued by difficulties. The International Bar Association report, in May 2003 noted that there were only 250 lawyers in the country who could act to realize these rights.
Furthermore, while article 15 of the Malawi Constitution permits persons with ‘sufficient interest’ to file cases before the Court in human rights cases (like the Indian and South African example), in *R v. Registrar General, ex.p. CILIC*, it was held that there was no provision, for Public Interest Litigation. A systematic insistence upon maintaining barriers to social justice, in countries already suffering from a history of social oppression is perhaps not the wisest choice. In court to, the norm has been that political, anthropological, economic and other factors have often are disregarded in favour of strictly legal and jurisprudential arguments.92 Substantively, too, the Court has forsaken opportunities to develop a jurisprudence that is for the marginalized in society.93 In such a scenario it is difficult to say how far the existence of a transformative constitution has in reality helped the country transform. Perhaps, the lesson that we can take from Malawi is that transformative constitutional thinking is as important as the existence of a transformative constitution for the fate of the people.

4.2 Bolivia’s Constitution: Post-Colonial despite 200 Years of Independence:

Bolivia won its independence in 1825 from Spain. In the bulk of Latin America, however, independence did not translate into a ‘rights-based’ constitutionalism aimed at securing social transformation, but instead as a means of formalizing government structure.94 Therefore, the constitution continued to have traces of colonialism well into the 20th century. In fact, the current constitution, which actually marks a break with the past, was promulgated in 2009. Two struggles, the ‘war for water’ and the ‘war for gas’ led to political change that brought an indigenous Bolivian president into power for the first time, thus paving the way for a ‘transformative constitution’.95

The preamble of the constitution itself posits the constitution as “pluralistic”, moving away from racism, and a “postcolonial” enterprise.96 As a plurinational state which takes inspiration from indigenous religious sentiments, (In fact, the preamble itself refers to Pachamama, the traditional Andean mother Goddess), the Constitution takes indigenous concerns seriously. In contrast to traditional Andean civilisation, however, it also provides for equality of the sexes.97 Article 8 and 9 lay down the ‘ethical-moral’ foundations of the constitution—again based on traditional principles. Commentators have considered this commitment to

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92 See, for instance, in cases of wider social import: *Jere v. Malawi National Examinations Board; HRC v. Attorney General; R v. Kunyambo; and Koreia v. Designated Schools Board*
93 Especially in the cases of land rights, which in Malawi, is tied intimately to questions of poverty and life. See *Mchima Tea and Tung Estates Co. Ltd v. Concerned Persons.*
96 Preamble, CONST. OF BOLIVIA.
97 Id.
plurinational culture ‘unprecedented’ and ‘novel’98, and have argued that this experiment is one that should be taken seriously.

This respect for indigenous rights is a feature of a number of Latin American constitutions—Ecuador is the first country which recognised plurinational rights (in 1988) and also the first to invoke Pachamama. Usefully, this helps us to understand that the processes that colonialism puts into motion do not only depend on colonial masters, but may take a significant set of events to remove.

**CONCLUSION:**

In the course of this chapter, we have examined what the global south means, what it entails, and how the processes of constitutional creation and validation operate in these regions. Through this detailed examination, we see the multiple benefits of studying comparative constitutional law of and from the perspective of the global south, and the kinds of solutions select constitutions have come up with to complicated questions of national identity, social and economic advancement, and colonialism.

While we have seen that the problems these countries face are often similar, one cannot argue that the solution they have often appointed has been the same. Indeed, often, an examination of the differences proves more instructive in fulfilling the wider aims of the comparative constitutional law project.

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98 Robert Albro, Confounding Cultural Citizenship and Constitutional Reform in Bolivia, Lat. Am. Persp. 71,72.